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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

United States of America,

Plaintiff,

vs.

Ian Christopherson,

Defendant

Case No.: 2:09-cr-00056-MMD-RJJ

MOTION TO VACATE SENTENCING
DATE AND SET ASIDE JURY VERDICT

MOTION TO VACATE SENTENCING DATE AND SET ASIDE JURY VERDICT

NOW COMES Defendant, Ian Christopherson, by and through his attorney of record, Joshua Tomsheck, Esq., of the law firm of Hofland & Tomsheck, and hereby moves that this Honorable Court vacate the sentencing date currently scheduled in this matter and set aside the jury verdict previously rendered.

This Motion is based on 28 U.S.C. §§ 144 and 455, Federal Rule of Criminal Procedure 33 and the following points and authorities.

DATED this 27th day of November, 2012.

HOFLAND & TOMSHECK

_____/s/_____
JOSHUA TOMSHECK, ESQ.
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2 POINTS AND AUTHORITIES

3 BACKGROUND AND RELEVANT FACTS

4 As this Court knows, Defendant Ian Christopherson, (hereinafter
5 "Christopherson") is a duly licensed Nevada attorney practicing in this jurisdiction since
6 1990. The events giving rise to this case date back to the time period of 1994 through
7 1998, for which the Defendant stands convicted, following jury verdict, of evading
8 payment through the utilization of a bank account in Montana held under the name of
9 Industrial Consultants. An Indictment was filed in this case in February of 2009,
10 following extended and extensive talks of negotiation between Christopherson and the
11 Government. Christopherson and his then Defense counsel disclosed to the
12 Government in excess of one (1) year prior to Indictment that Christopherson had a
13 professional relationship with the Judge in this matter, having previously been a tenant,
14 renting office space from the then assigned Judge, the Hon. Kent J. Dawson. This
15 information was known to the Government since 2007 and caused them to file a
16 "NOTICE AND REQUEST FOR DETERMINATION UNDER 28 U.S.C. § 455(a) AND
17 CODE OF JUDICIAL CONDUCT, CANON 3E(1)(a)" on August 3, 2009. (ECF no. 16, p.
18 1). In that document, the Government stated that:

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22 "Over a year prior to the defendant's indictment, at a meeting between
23 the government, the defendant, and defense counsel, either the defendant
24 or his counsel made reference to the fact that defendant had previously
25 rented space from a federal judge in the District. At the time, counsel for
26 the government did not find the comment significant or take note of
27 which judge. In the course of preparing for trial, government counsel
28 reviewed documents which show that the defendant previously rented
office space at 626 S. 3rd Street, Las Vegas, Nevada 89101, from Judge
Dawson, who is assigned to the above-captioned matter. It does not

1 appear that the defendant, who rented the space under a partnership
2 name, Burke & CHRISTOPHERSON, still rents space from Judge Dawson.
3 The government does not know whether the defendant personally knows
4 or directly interacted with Judge Dawson. Government counsel has
5 reviewed bank statements which suggest that defendant paid for the
6 rental with from the account of "CHRISTOPHERSON et. al. (sic)
7 Partners."
8 (Id. at p. 2).

9 The Court did not enter an Order on the request for determination until
10 September of 2011, shortly before this matter proceeded to Trial. (ECF no. 58, p. 1). The
11 Hon. Judge Dawson ruled that, to the best of his recollection, the relationship between
12 the Court and Christopherson, and their various corporate entities, ended without
13 incident in 2001. (Id. at p. 2). The Hon. Judge Dawson further ruled that "[t]he Court
14 has a sworn duty not to disqualify itself unless there are proper and reasonable grounds
15 for doing so (*citing State of Idaho v. Freeman*, 478 F.Supp. 33 (D.C. Idaho, 1979) and that
16 "[t]here is as much an obligation for judge not to recuse himself, when there is no
17 occasion for him to do so, as there is for him to do so when there is." (*citing U.S. v.*
18 *Burger*, 964 F.2d 1065 (10th Cir. 1992))." (ECF no. 58). Ultimately, the Court chose not to
19 recuse itself. (Id.).

20 Between September 19, 2011 and September 23, 2011, this matter proceeded to
21 jury Trial before the Hon. Judge Dawson. The case was heavily contested and many
22 evidentiary issues were litigated before, and during, Trial. At the conclusion of Trial,
23 Christopherson was convicted of both counts. The undersigned counsel was later
24 retained for post-trial proceedings, specifically sentencing. After continuances were
25 either stipulated to by all Parties or granted by the Court, this matter was scheduled for
26 sentencing on September 4, 2012.
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1 At the scheduled September 4, 2012 sentencing hearing, the Hon. Judge Dawson
2 made a lengthy record about the previous proceedings in this matter, as well as the
3 Government's position on recusal in other pending and/or recently decided cases. At
4 that hearing, Hon. Judge Dawson made a ruling that he was recusing himself from
5 presiding over the case for sentencing, and all other future proceedings, based on the
6 issues *previously* brought to the Court's attention by the Government, *prior* to Trial.
7 Judge Dawson made further record that the case would be reassigned to an alternate
8 department. That same day, Judge Dawson signed the recusal order. (ECF no. 134).
9 Sentencing was later reset before the newly assigned judicial department, the Hon. Chief
10 Judge Robert C. Jones, for October 10, 2012. Thereafter, a minute order in chambers was
11 issued by the Hon. Chief Judge Robert C. Jones, that it was ORDERED that this case be
12 referred to the Clerk for random reassignment of this case for all further proceedings
13 and the October 10, 2012 sentencing be VACATED. Thereafter, this matter was assigned
14 to this Honorable Court.
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18 Following the recusal of the Hon. Judge Dawson in this case, he also recused
19 himself in another case in which Christopherson was counsel, namely 2:12-cv-01197-
20 LRH-PAL, in which a recusal order was entered September 17, 2012.

21 APPLICABLE LAW

22 Recusal is governed by 28 U.S.C. §§ 144 and 455. The standard for recusal in
23 sections 144 and 455 is "whether a reasonable person with knowledge of all the facts
24 would conclude that the judge's impartiality might reasonably be questioned." United
25 States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986). Under § 455(a), "[a]ny justice, judge,
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1 or magistrate of the United States shall disqualify himself in any proceeding in which his
2 impartiality might reasonably be questioned." Id. Section 455(a) covers situations, in
3 which there appears to be a conflict of interest, regardless of whether there is any actual
4 bias on the part of the judge. Preston v. United States, 923 F.2d 731, 733 (9th Cir. 1991).
5 Recusal is required if a reasonable person, knowing all of the relevant facts, would
6 expect the judge to know of circumstances creating an appearance of partiality. Lifeberg
7 v. Health Services Acquisition Corp. 486 U.S. 847, 861 (1988). The "very purpose of the
8 of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of
9 impropriety whenever possible." Id. at 865(1988). What matters is not the reality of bias
10 or prejudice but its appearance. See Liteky v. United States, 510 U.S. 540, at 548 (1994).
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13 The relevant appearance is not subjective. It does not matter whether any
14 observer, reasonable or not, actually doubts the judge's impartiality. It also does not
15 matter whether the judge actually has any bias. As stated by the United States Supreme
16 Court, "[s]ince subsection (a) deals with the objective appearance of partiality ... the
17 judge does not have to be subjectively biased or prejudiced, so long as he appears to be
18 so." See Liteky, supra at 553.
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20 The Code of Conduct for United States Judges and the Nevada Code of Judicial
21 Conduct include similar language related to situations in which a judge should recuse.
22 Canon 3(C)(1)(a) of the Code of Conduct for United States Judges (Effective July 1, 2009)
23 provides that "[a] judge shall disqualify himself or herself in a proceeding in which the
24 judge's impartiality might reasonably be questioned, including but not limited to
25 instances in which the judge has a personal bias or prejudice concerning a party. *See also*
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1 Nevada Code of Judicial Conduct, Canon 3(E)(1)(a).¹

2 Federal Rule of Criminal Procedure Rule 33 discusses the circumstances in which
3 a new Trial is warranted, and states:

4 (a) Defendant's Motion. Upon the defendant's motion, the court may
5 vacate any judgment and grant a new trial if the interest of justice so
6 requires. If the case was tried without a jury, the court may take
7 additional testimony and enter a new judgment.

8 (b) Time to File.

9 (1) Newly Discovered Evidence. Any motion for a new trial
10 grounded on newly discovered evidence must be filed within 3
11 years after the verdict or finding of guilty. If an appeal is pending,
12 the court may not grant a motion for a new trial until the appellate
13 court remands the case.

14 ARGUMENT

15 In most cases motions related to disqualification or recusal of a Judge, the Motion
16 is brought, and decided, *prior* to the case proceeding to Trial, pursuant to 28 USCS § 144,
17 which requires disqualification motions to be submitted prior to 10 days before trial
18 unless good cause is shown why motion was not made within the said time limit. In the
19 instant case, the issue of recusal was raised, by the Government, far in advance of the 10
20 day limitation. (ECF no. 16). This case however, is different, namely because the Court
21 addressed the issue *prior* to Trial, and denied to recuse itself, and then recused itself,
22 based on the appearance of a potential impartiality, *after* presiding over the Trial. The
23 facts leading to the Court's ultimate decision of recusal were no different on September
24 4, 2012, when the Court decided to recuse itself, then they were on August 3, 2009, when
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27 ¹ The commentary to the Nevada Code of Judicial Conduct provides that "[a] judge should disclose on the record
28 information that the judge believes the parties or their lawyers might reasonably consider relevant to the question of

1 the Government raised the issue, or they were on September 1, 2011, when the Court
2 entered an Order denying recusal, *or* between September 19, 2011 and September 23,
3 2011, when this case was tried to a jury. It seems as if the exact same reasons articulated
4 by the Government before Trial, are the exact same reasons why, *post*-trial, the Hon.
5 Judge Dawson recused himself. The issues this raises are readily apparent. Given the
6 post-trial recusal, this calls into question whether recusal was warranted before each and
7 every judicial decision rendered before, and during, Trial.

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9 While a motion for disqualification filed after judgment is generally considered
10 untimely (*see Waggoner v Dallaire*, 649 F2d 1362, (9th Cir. 1981)), recusal in this case has
11 already been determined appropriate by Judge Dawson, and judgment has not yet been
12 imposed. Given the procedural posture of this case, with Judge Dawson's recusal after
13 trial and before sentencing, the timing of the instant motion is appropriate.

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15 Because Judge Dawson's recusal was made part of the record and an Order was
16 entered on September 4, 2012, the recusal amounts to "new evidence" in this case. Judge
17 Dawson indicated on September 4, 2012, to the surprise of the parties that, based on
18 issues raised by the Government in this (and another) case, he felt there was a
19 circumstance where a reasonable person may "conclude that the judge's impartiality
20 might reasonably be questioned." *See United States v. Studley, supra*. As such, the
21 finding of the Court warranting reversal calls into question the very Trial for which
22 Christopherson stands convicted. This is clearly a situation where Federal Rule of
23 Criminal Procedure Rule 33 is applicable, in that this Court should grant a new trial
24 because the interest of justice requires that it do so. The recusal of Judge Dawson, is a
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28 disqualification, even if the judge believes there is no real basis for disqualification." Commentary Canon 3(E)(1).

1 "newly discovered" piece of evidence only discoverable after the verdict of guilty
2 rendered against Christopherson. No judgment or sentence has yet been imposed in this
3 matter. Given the acquiescence of Judge Dawson, based on issues *raised by the*
4 *Government* that a reasonable person could conclude that the judge's impartiality might
5 reasonably be questioned, and recusal warranted, this is a case where a new Trial is
6 mandated. While the undersigned is clear to point out that neither he, nor
7 Christopherson, is alleging any specific instance of actual impropriety on the part of
8 Judge Dawson, the clear intent of Section 455(a) is to promote confidence in the judiciary
9 by avoiding even the appearance of impropriety whenever possible. It matters not the
10 reality of bias or prejudice *but rather its appearance*. See *Liteky v. United States, supra*.
11

12 CONCLUSION

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14 As outlined above, the recusal in this case of Judge Dawson warrants that the
15 sentencing date currently set for December 3, 2012 be vacated and the jury verdict in this
16 matter be set aside.
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19 DATED this 27th day of November, 2012.

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21 HOFLAND & TOMSHECK

22
23 /s/
24 JOSHUA TOMSHECK, ESQ.
25 Counsel for Defendant Christopherson
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